No. 15006.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, as Secretary of State,

Appellant,

vs.

QUAN YOKE FONG,

Appellee.

APPELLANT'S OPENING BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division,

JAMES R. DOOLEY,
Assistant U. S. Attorney,

600 Federal Building,
Los Angeles 12, Calif.

Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

PAGE

No. 15006.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, as Secretary of State,

Appellant,

vs.

QUAN YOKE FONG,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdiction.

Appellee, plaintiff in the Court below, brought action in the District Court, seeking to be declared a national of the United States [R. 3-5].[1] Jurisdiction was invoked pursuant to Section 503 of the Nationality Act of 1940, 54 Stat. 1171-1172, 8 U. S. C. A. §903 [R. 5]. Appellant contends that the Court below was without jurisdiction of the subject matter, since appellee had not been denied a right or privilege as a national of the United States upon the ground that he was not such a national at the time his complaint was filed on December 23, 1952 [R. 5], or before the repeal of Section 503 of the Nationality Act of 1940.[2]

---

[1]"R" refers to printed Transcript of Record.

[2]Section 503 was repealed by Section 403(a)(42) of the Immigration and Nationality Act of 1952, 66 Stat. 280, effective December 24, 1952 (See, Sec. 407 of the Immigration and Nationality Act of 1952, 66 Stat. 281).

Since the judgment of the District Court [R. 38-39] was a final decision, this Court has jurisdiction of an appeal from that decision pursuant to 28 U. S. C., Section 1291. However, the jurisdiction of this Court ends if it finds the District Court was without jurisdiction of the subject matter [*United States v. Corrick,* 298 U. S. 435, 440 (1936)].

Statement of the Case.

On December 23, 1952, appellee filed a complaint in the District Court under Section 503 of the Nationality Act of 1940, seeking a judgment declaring him to be a national of the United States [R. 3-5]. He alleged that he was born in China on February 13, 1930, as the lawful issue of the marriage between Quan Lun Hong and Gee Bo Yoke [R. 3]; that his father, Quan Lun Hong, was a citizen of the United States at the time of appellee's birth and had resided in the United States since May, 1915 [R. 3-4]; and that appellee thus acquired United States citizenship at birth pursuant to Section 1993, Revised Statutes of the United States [R. 4].

Appellee's complaint further alleged that he had theretofore filed at the American Consulate General in Hong Kong for an American passport or other travel document to travel to the United States [R. 4], but that the Consulate General had refused to issue to him the passport applied for [R. 4-5]; and that appellant had denied him the right to enter the United States and reside therein as an American citizen upon the ground that he was not a United States national [R. 5].

On May 6, 1955, appellant moved to dismiss appellee's action pursuant to Rule 12(b)(1) and (6) and Rule 12(h), Federal Rules of Civil Procedure, on the grounds

hat the court lacked jurisdiction over the subject matter f the action and that the complaint failed to state a laim upon which relief could be granted [R. 13]. In upport of this motion there was received in evidence s Exhibit "A" [R. 16, 63] the certified passport file elating to appellee. This file disclosed that appellee's assport application was executed on May 13, 1952; hat on November 13, 1952, an American Vice Consul ecommended that the application be denied, and that on he same day this recommendation was concurred in by he American Consul; and that the Department of State isapproved appellee's passport application on January , 1953. Also received in evidence in support of Appel-ant's Motion to Dismiss was an authenticated Statement Regarding the Processing of Passport Applications at he American Consulate General in Hong Kong [R. 16, 3, Ex. B]. Appellant's Motion to Dismiss was denied n May 16, 1955 [R. 16, 60-61]. During trial appellant enewed his Motion to Dismiss for lack of jurisdiction R. 95-96].

Also on May 6, 1955, appellant filed a motion to re-uire appellee and his alleged parents to submit to blood ests under Rule 35, Federal Rules of Civil Procedure R. 9-12]. An affidavit in support of this motion [R. 0-12] recited among other things that records in pos-ession of appellant showed an incompatibility between ppellee's blood grouping and the blood grouping of is alleged parents [R. 11]. This motion was granted R. 16, 61], and an order was filed requiring appellee, who resided in Hong Kong, B. C. C., to furnish a sample f his blood to be transported to the West Coast Medical Laboratories, Los Angeles, California, for testing, and urther requiring appellee's alleged parents to undergo lood tests [R. 16-19].

On March 21, 1955, the case had been continued to July 11, 1955, "for setting for trial" [R. 8]. However, because appellee's alleged mother was "contemplating a trip to Hong Kong" [R. 61], the court set trial for June 1, 1955, in order to obtain her testimony before her departure [R. 61-64]. The testimony of appellee's witnesses was taken on June 1, 1955, with the understanding that a further hearing would be held [R. 140, 145] and that decision would be held in abeyance until the results of blood tests were received [R. 61-64].

On July 1, 1955, appellant filed a motion for a supplemental order to require appellee to furnish a blood sample [R. 20-22]. An affidavit of Albert L. Blifield, clinical laboratory technician employed by West Coast Medical Laboratories, was filed in support of this motion. This affidavit recited, among other things, that the blood of appellee's alleged parents had been tested on June 9, 1955 [R. 22], but that it was impossible to test the sample of appellee's blood which had been shipped from Hong Kong because it was completely hemolyzed upon arrival; that he had recently examined several blood samples shipped from Hong Kong, and that in all cases except two had found the samples in good condition and had tested them for grouping and type [R. 21-22].

On August 16, 1955, the trial court, without a further hearing, denied appellant's motion for a supplemental order to require appellee to furnish a blood sample, and ordered judgment for appellee. The court refused to continue the matter to allow appellant to present evidence of the results of blood tests of appellee and his alleged parents, and further refused to permit appellant to make an offer of proof as to such evidence [R. 147-148].

On September 12, 1955, appellant moved for a new trial on the grounds, *inter alia,* of newly discovered evidence which could not with reasonable diligence have been discovered and produced at the trial [R. 39-57]. On October 3, 1955, this motion was denied [R. 57, 149-155].

Statement of Points.

(1) The District Court was without jurisdiction to declare appellee a national or citizen of the United States, since appellee was not denied a right or privilege as a national of the United States upon the ground that he was not a national of the United States prior to the repeal of Section 503 of the Nationality Act of 1940.

(2) The District Court erred in denying appellant's motion to dismiss for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted.

(3) The District Court erred in its Finding of Fact Number IV.

(4) The District Court erred in denying appellant's motion for supplemental order to require plaintiff to furnish blood sample.

(5) The District Court erred in declaring appellee a national and citizen of the United States of America without receiving and considering available evidence of the results of blood tests of appellee and his alleged parents.

(6) The District Court erred in refusing appellant's offer of proof as to the results of blood tests of appellee and his alleged parents prior to declaring appellee a national and citizen of the United States of America.

(7) The District Court erred in denying appellant's motion for new trial based upon newly discovered and newly obtained evidence consisting of the results of blood tests showing that appellee could not be the son of his purported father.

Questions Presented.

(1) Do the facts establish the jurisdictional requisite for an action under Section 503 of the denial on the ground that appellee is not a United States national?

(2) Does the savings clause of the 1952 Act permit a suit as to which there was no jurisdiction when Section 503 was repealed to be jurisdictionally revived by virtue of an express administrative denial of the claimed right after the new Act took effect?

(3) Did the District Court err in denying appellant's motion for a new trial?

(4) Did the District Court erroneously prevent appellant from presenting or offering any evidence to show that appellee's blood was incompatible with that of his alleged parents?

(5) Did the District Court err in denying appellant's motion for a supplemental order to require appellee to furnish a blood sample?

Statutes Involved.

Section 1993 of the Revised Statutes of the United States, on February 13, 1930, the alleged date of appellee's birth, provided:

> "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of

the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U. S. C. A., Section 903, provides in pertinent part:

"Sec. 503. If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the District Court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States * * *."

Section 405(a) of the Immigration and Nationality Act of 1952, 66 Stat. 280, 8 U. S. C. A., note following Section 1101, provides in pertinent part:

"Sec. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed * * * to affect any prosecution, suit, action or proceedings, civil or criminal brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, [*sic*] conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act, are unless otherwise specifically provided therein, hereby continued in force and effect * * *."

I.

The Facts Do Not Establish the Jurisdictional Requisite for an Action Under Section 503 of Denial on the Ground That Appellee Is Not a United States National.

A. Jurisdictional Requisites for an Action Under Section 503.

In *Dulles v. Lee Gnan Lung,* 212 F. 2d 73 (C. A. 9, 1954), this Court laid down the jurisdictional requirements for an action under Section 503 of the Nationality Act of 1940 as follows (p. 75):

> "Section 503 of the Nationality Act of 1940, 8 U. S. C. A. §903, did not give any court jurisdiction of any action other than an action instituted by a person *who had claimed a right or privilege as a national of the United States and had been denied such right or privilege by a Department or agency, or, executive official thereof, upon the ground that he was not a national of the United States."* (Emphasis added.)

There are no presumptions in favor of the jurisdiction of the courts of the United States [*Grace v. American Central Ins. Co.,* 109 U. S. 278 (1883); *Ex parte Smith,* 94 U. S. 455 (1876)]. Consequently, the requisites for jurisdiction as enunciated in *Lee Gnan Lung* must not only be alleged in the pleadings [*Elizarraraz v. Brownell,* 217 F. 2d 829 (C. A. 9, 1954); *Clark v. Inouye,* 175 F. 2d 740 (C. A. 9, 1949)]; but, if challenged in any appropriate manner, must be supported by competent proof [*McNutt v. General Motors Acceptance Corp.,* 298 U. S. 178 (1936); *Ling Share Yee v. Acheson,* 214 F. 2d 4 (C. A. 3, 1954), cert. den. 348 U. S. 873; *Celite Corporation v. Dicalite Co.,* 96 F. 2d 242, 249 (C. C. A. 9, 1938)].

It was therefore incumbent upon appellee to prove that at the time his complaint was filed, he had been denied a right or privilege as a national of the United States upon the ground that he was not a national of the United States.

B. There Was No Express Denial.

Clearly, there was no express denial of appellee's passport application, either at the time his action was instituted on December 23, 1952 [R. 5] or when Section 503 of the Nationality Act of 1940 was repealed on December 24, 1952. Appellee's passport file [Ex. A] discloses that his passport application was executed on May 13, 1952; that on November 13, 1952 an American Vice Consul *recommended* that the application be denied; and that the Department of State disapproved the application on January 6, 1953. Thus, there was no express denial of appellee's passport application until January 6, 1953.

C. There Was No Implied Denial.

The District Court did not find an express denial, but assumed jurisdiction on the ground that the delay in acting upon appellee's passport application prior to the time his action was filed was unreasonable and "a denial of plaintiff's rights and privileges as a national and citizen of the United States" [Finding of Fact IV, R. 37]. This finding, although nominally a finding of fact, is in substance a conclusion of law; and this Court is not bound by the rule that findings shall not be set aside unless clearly erroneous [Rule 52(a), Federal Rules of Civil Procedure], but is free to draw its own conclusions [*Stevenot v. Norberg,* 210 F. 2d 615, 619 (C. A. 9, 1954); *Plumb Tool Co. v. Sanger,* 193 F. 2d 260, 264

(C. A. 9, 1952), cert. den. 343 U. S. 919; *Brown v. Cowden Livestock Co.,* 187 F. 2d 1015, 1017-1018)].

Appellee's passport application was executed on May 13, 1952 [See, Ex. A] and his complaint was filed on December 23, 1952 [R. 5]. Thus, the delay which the District Court found to be unreasonable amounted to only 7 months and 11 days. Even if Rule 52(a) were applicable, in view of the statutory duty imposed upon appellant to make an administrative determination of appellee's nationality prior to issuing a passport; the inability due to appellee's place of birth and prior residence to verify his nationality through official sources; and the congestion of the administrative calendar at the American Consulate at Hong Kong, caused by a deluge of similar applications; the finding of the District Court that a delay of only 7½ months in passing upon appellee's passport application was unreasonable, is clearly erroneous.

The authority to issue passports has been conferred by statute upon the Secretary of State under such rules as might be prescribed by the President (Sec. 1 of the Act of July 3, 1926, 44 Stat. 887, 22 U. S. C. A., Sec. 211a); and Congress has prohibited the issuance of passports to persons other than those owing allegiance to the United States (Sec. 4076, Revised Statutes of the United States, as amended by the Act of June 14, 1902, 32 Stat. 386, 22 U. S. C. A., Sec. 212).[3] By Executive Order, the Secretary of State is empowered to "require such additional evidence of citizenship as in his judgment may be

---

[3]Of course "alien passports" may be issued (Act of Mar. 2, 1921, 41 Stat. 1217, 22 U. S. C. A., Sec. 227); however, appellee did not apply for a passport as an alien, but as a citizen [R. 23].

necessary to establish the citizenship of an applicant for a passport" (Ex. Order 7856, 22 C. F. R., Sec. 51.65).[4]

The statutes referred to above manifest a Congressional intent that an administrative determination of United States nationality and/or citizenship should precede the issuance of a passport, since granting of passports to persons other than those owing allegiance to the United States is prohibited. Thus, when appellee filed his application for a passport as a citizen, he did not thereby acquire an immediate "right" to the issuance of a passport; nor did he acquire an immediate right to a determination of his claim to citizenship. He was only entitled to have his claim processed in accordance with normal administrative procedures, considering all the facts and circumstances of the case.

Appellee alleged birth on the mainland of China on February 13, 1930 [R. 3]. He had resided at various places in China and in Hong Kong from the date of his birth until his application was filed [See Ex. A]. He did not submit in support of his application a birth certificate or other official documentary evidence, as is normally available in other countries [Ex. B, p. 6]. Because the mainland of China was "closed" to the United States at the time appellee's passport application was filed, it was impossible to verify his name, place of birth, places of residence, and family history from official sources [Ex. B, p. 2]. It was thus necessary for the Consul General to attempt to obtain and evaluate secondary evidence of appellee's citizenship. This was done by requesting the

---

[4]Ex. Order 8820, 22 C. F. R. 107.3, authorizes officers of the Foreign Service to issue passports to American nationals pursuant to such provisions of Ex. Order 7856 as may be applicable to the issuance of passports abroad.

District Director, Immigration and Naturalization Service, Los Angeles, California, to blood test appellee's alleged parents [see, Letter dated July 21, 1952, contained in Ex. A], by having appellee blood tested [see, Report of Dr. Eric Vio, dated October 21, 1952 contained in Ex. A], and by interviewing appellee [see Interview of October 28, 1952 in Ex. A].

Nor was appellee entitled to priority in the processing of his application, since a large number of similar applications had been filed. Defendant's Exhibit B, an authenticated Statement Regarding the Processing of Passport Applications at the American Consulate General in Hong Kong, discloses that with the closing of the American Consulate General at Canton in 1949, a heaving load of citizenship cases were transferred to Hong Kong [p. 1], that a deluge of applications later descended on the Consulate General at the rate of 150 per month [pp. 1, 3]; that lack of funds, personnel, and office space limited the number of applications which could be processed [pp. 5-6]; that as of September 1, 1952, more stringent examination and investigation procedures were authorized, including the blood-typing of claimants and their alleged parents, since the State Department's review of the citizenship claims passed upon at Hong Kong convinced it that a large number of fraudulent claimants were proceeding to the United States [p. 4]; and that the more detailed examination and investigation of claims and the incidence of court actions requiring work on applications for certificates of identity under Section 503 of the Nationality Act of 1940, slowed down the rate of processing claims [p. 4].

During trial appellee offered evidence that his alleged father cabled the Consulate General on December 11, 1952

and wired the State Department six days later to the effect that unless he was notified prior to December 23, 1952 that the application was approved, it would be assumed that the application was denied [R. 79-84, 133-135, Exs. 7 and 8]. These messages did not create a denial. Appellee had no right by sending them to thus force a preference in the handling of his application over those previously pending in the State Department.

In view of the foregoing, it is submitted that the delay of only seven and one-half months here involved was not unreasonable, and that the conclusion of the District Court to the contrary was clearly erroneous. The decisions which have found an implied denial from delay involved periods of substantially greater length. For example, in *Chin Chuck Ming v. Dulles,* 225 F. 2d 849 (C. A. 9, 1955), an affidavit-application[5] for passport was filed with the American Consulate General at Hong Kong on September 6, 1951, and a period of 15 months and 16 days elapsed between the date of such filing and the institution of court action. And in *Wong Ark Kit v. Dulles,* 127 F. Supp. 871 (D. Mass., 1955), a period of almost three years elapsed between the date an affidavit was executed by plaintiff's alleged father and the date suit was brought. These decisions not only lack persuasive weight as applied to the facts of the case at bar, but emphasize the fact that a delay of only 7½ months was not unreasonable.

---

[5]In the present case the affidavit of appellee's alleged father was not filed with the American Consulate General until April 29, 1952 [See, Affidavit in Ex. A]. Thus, even if this affidavit is considered as an application, it would add only 14 days to the period of delay.

II.

The Savings Clause of the 1952 Act Does Not Permit a Suit as to Which There Was No Jurisdiction When Section 503 Was Repealed To Be Jurisdictionally Revived by Virtue of an Express Administrative Denial of the Claimed Right After the New Act Took Effect.

As has previously been shown, appellee has not been denied a right or privilege as a national of the United States upon the ground that he was not such a national, either actually or constructively, when his suit was brought or when Section 503 was repealed. However, his application for passport was expressly denied by the Secretary of State on January 6, 1953. The issue is thus presented as to whether the savings clause contained in the Immigration and Nationality Act of 1952 permitted his suit to be jurisdictionally revived by virtue of the express administrative denial of the claimed right after the new Act took effect. Appellant submits that it did not. This issue was briefed by appellant in the appeal of *John Foster Dulles v. Tam Suey Jin,* No. 14947, and appellant hereby incorporates the applicable portion of its opening brief in that case (pp. 14-24) into the present brief.[6]

---

[6]A stipulation was approved by this Court permitting such incorporation.

III.

The District Court Erred in Denying Appellant's Motion for a New Trial.

A. Blood Tests Show That It Is Not Possible for Appellee To Be the Son of His Alleged Father.

Affidavits filed in support of appellant's Motion for a New Trial show that evidence is available to prove, based upon blood tests made of appellee and his alleged parents that *it is not possible for appellee to be the child of his alleged father,* and that consequently, it was not possible for appellee to have acquired citizenship of the United States at birth pursuant to Section 1993, Revised Statutes of the United States.

The affidavit of Albert L. Blifield, clinical laboratory technician employed by West Coast Medical Laboratories [R. 45-47] discloses that he tested the blood of appellee and his alleged parents with the following results [R. 45-46].

Lun Hong Quan

Blood Group:	"AB"
MN Factors:	"M" positive
	"N" positive
MN Type:	Type "MN"

Gee Bo Yook

Blood Group:	"B"
MN Factors:	"M" positive
	"N" positive
MN Type:	Type "MN"

Quan Yoke Fong

Blood Group:	"O"
MN Factors:	"M" positive
	"N" negative
MN Type:	Type "M"

The affidavit of Dr. Michael A. Rubinstein, hematologist [R. 47-50], states that, based upon the blood tests as set forth above, *"it is not possible for Lun Hong Quan (sic) to be the blood father of Quan Yoke Fong"* [Emphasis added. R. 50]. Both affiants are willing to testify in court concerning the matters set forth in their affidavits [R. 47, 50].

B. Blood Tests of the A-B-O System Excluding Paternity Should Operate Conclusively.

Whether federal or state law governs,[7] blood tests of the A-B-O system excluding paternity should operate conclusively. The most enlightened judicial thought on the weight to be accorded blood tests excluding paternity is perhaps embodied in the Uniform Act on Blood Tests to

---

[7]Appellant believes that federal law should govern, notwithstanding the doctrine enunciated in *Erie R. Co. v. Tompkins,* 304 U. S. 64 (1938), 114 A. L. R. 1487, that a Federal court will apply the substantive law of the State wherein it sits [See also, *Klaxon Co. v. Stantor Electric Mfg. Co.,* 313 U. S. 487 (1941); *Guaranty Trust Co. v. York,* 326 U. S. 99 (1940)]. The *Erie* doctrine has generally been limited to cases arising out of diversity of citizenship; and in the interpretation and application of federal statutes, such as the statute here involved, federal rather than local law applies [*United States v. Standard Oil Co.,* 332 U. S. 301 (1947); *Holmberg v. Armbrecht,* 327 U. S. 392 (1946); *Clearfield Trust Co. v. United States,* 318 U. S. 363 (1943); *Wragg v. Federal Land Bank,* 317 U. S. 325, 328-329 (1943); *Sola Electric Co. v. Jefferson Co.,* 317 U. S. 173, 176 (1942); *D'oench, Duhme & Co. v. F. D. I. C.,* 315 U. S. 447, 455-456 (1942); *Board of Comm'rs v. United States,* 308 U. S. 343 (1939); *In re Pittsburgh Rys. Co.,* 155 F. 2d 477 (C. C. A. 3, 1946)]. The necessity for uniformity in cases involving United States citizenship [See, *Clearfield Trust Co. v. United States, supra,* for another situation where uniformity was required] would seem to lend support to the position that federal rather than state law governs the weight to be accorded blood tests excluding paternity in the case at bar. It would be anomalous if a child born abroad would be able to establish his United States citizenship in a state where blood tests excluding paternity were not conclusive, while not being able to do so in a state where such tests are given conclusive effect.

Determine Paternity, adopted by the National Conference of Commissioners on Uniform State Laws in 1952 at San Francisco. This Act makes the results of blood tests excluding paternity conclusive when there is no dispute among the experts employed as to the results. The language used by the commissioners in their prefatory note to the Act is illuminating [See 9 Uniform Laws Annotated, 1955 Cumulative Annual Pocket Part, pp. 13-14]:

> "As to the make-up of the blood, the testing process is reasonably simple. It is practically the same thing in which the 11 million or more men were tested in determining blood types in the service. It is the same kind of test made of the blood of donors to the Red Cross and hospital blood banks. Consequently, *this is one of the few classes of cases in which judgment of court may be absolutely right by use of science.* In this kind of a situation it seems intolerable for a court to permit an opposite result to be reached when the judgment may scientifically be one of complete accuracy. *For a court to permit the establishment of paternity in cases where it is scientifically impossible to arrive at that result would seem to be a great travesty on justice.* In the scientific area there are relatively few situations where the results may be made absolutely conclusive. In many cases where medical expert testimony is used the testimony is really based on expert opinion only, but in the blood test to determine nonpaternity by classification into groups, while the opinion of a doctor may be involved, it is the kind of an opinion on which experts will not differ. *A statute upon the subject ought to take into account this situation of certainty and make the medical testimony final as against all other testimony when nonpaternity is scientifically proved."* [Emphasis added.]

Even before the adoption of the Uniform Act, however, the most enlightened state court decisions and legal writers had taken this view [*Jordan v. Mace,* 144 Me. 351, 69 A. 2d 670 (1949); *Saks v. Saks,* 71 N. Y. S. 2d 797, 189 Misc. 667 (1947); *Cuneo v. Cuneo,* 96 N. Y. S. 2d 899, 198 Misc. R. 240 (1950); *Cortese v. Cortese,* 10 N. J. S. 152, 76 A. 2d 717 (1950); *Clark v. Rysedorph,* 118 N. Y. S. 2d 103, 281 App. Div. 121 (1952); Schatkin, Disputed Paternity Proceedings (2d Ed., 1947); Britt, "Blood-Grouping Tests and More 'Cultural Lag,'" 22 Minn. L. Rev. 836, 837 (1938); Maguire, "A Survey of Blood Group Decisions and Legislation in the American Law of Evidence," 16 So. Cal. L. Rev. 161, Note 39 Calif. L. Rev. 277 (1951); Note, 34 Cornell L. Q. 72 (1948); Note, 26 Calif. L. Rev. 456 (1938)].

In *Ross v. Marx,* 90 A. 2d 545, 21 N. J. Super. 95, the Essex County Court, New Jersey, held, in a paternity case, that a blood test exclusion is decisive of the issue of paternity. In awarding judgment to the defendant, the court stated (p. 546):

> "It is universally accepted in medical and scientific fields that the result of a blood grouping test disproving paternity or, to use the language of the statute, indicating definite exclusion of parentage, is not an expression of opinion upon which experts can differ but, rather, is the *statement of a scientifically established fact.* It is a scientifically established fact just as it is a scientifically established fact that the world is round. *As such it should be accepted by the courts of law.* For a court to declare that these tests are not conclusive would be as unrealistic as it would be for a court to declare that

> the world is flat. This a court of law, whose prime function is to ascertain trust and administer justice, should not do." [Emphasis added.]

In Schatkin, Disputed Paternity Proceedings (2d Ed., 1947), an authority often quoted, the author says (p. 184):

> "As far as the accuracy, reliability, dependability —even infallibility—of the tests are concerned, *there is no longer any controversy.* The result of the *test is universally accepted by distinguished scientific and medical authority."* [Emphasis added.]

And in Chapter VIII, "The Unerring Accuracy of Blood Tests," Schatkin relates that in 656 blood tests made between 1935 and 1945 by order of the Court of Special Sessions in New York City and resulting in 65 exclusions of paternity, every case of an exclusion "was followed by the mother's subsequent confession, for the first time, of sexual relations with another man about the time she became pregnant." [2d ed., p. 225.]

In California, the evolution which has taken place in the law concerning the weight to be accorded blood tests which exclude paternity is highly indicative of the most advanced judicial thought. Prior to 1953 these tests were not conclusive. Before then, the rule in California was set forth in *Arais v. Kalensnikoff,* 10 Cal. 2d 428, 74 P. 2d 1043, 115 A. L. R. 163. In that case the defendant was 70 years of age and denied that he had ever had relations with the plaintiff. Both the defendant and his wife testified that he had been impotent for a number of years. On the blood test, an eminent physician of Los Angeles testified that the blood grouping of the child was such that the defendant could not be the father;

and it was unquestioned that the test was fairly and correctly reported. The Supreme Court of California nevertheless permitted the finding of paternity based upon the oral testimony of the mother of the child to prevail. A similar ruling was subsequently made in *Berry v. Chaplin,* 74 Cal. App. 2d 652, 169 P. 2d 442 (1946).

The *Arais* and *Chaplin* cases were severely criticized by both courts and legal writers [*Gilpin v. Gilpin,* 94 N. Y. S. 2d 706, 709, 197 Misc. R. 319, 322 (1950); Schatkin, Disputed Paternity Proceedings (2d Ed., 1947) pp. 197-203; Schatkin, Disputed Paternity Proceedings (3d Ed., 1953); pp. 250-263; Britt, Blood-Grouping Tests and More "Cultural Lag," 22 Minn. L. Rev. 836, 837 (1938); Note, 26 Calif. L. Rev. 456 (1938); Note 34 Cornell L. Q. 72, 78-80 (1948); Note, 39 Calif. L. Rev. 277 (1951).] As a result of such criticism, California in 1953 adopted the Uniform Act on Blood Tests to Determine Paternity [California Code of Civil Procedure, Sections 1980.1-1980.7] almost in its entirety.

Thus, under the present California law, if there is no disagreement in the findings or conclusions of the experts, blood tests excluding paternity are regarded as conclusive. That this was the purpose of the present California law is made evident by the language of the Commissioners on Uniform State Laws in their prefatory note to the Act, commenting upon the *Arais* decision: "It is the purpose of this Act to remedy such unjust results in paternity cases." [9 Uniform Laws Annotated, 1955 Cumulative Pocket Part, p. 17.]

There is no federal statute governing the weight to be accorded the results of blood grouping tests which exclude paternity, and there is a dearth of federal deci-

sions on the subject [But see, *United States v. Shaughnessy,* 220 F. 2d 537 (C. A. 2, 1955), and *Lue Chow Kon v. Brownell,* 220 F. 2d 187 (C. A. 2, 1955), where the court held that these tests might be conclusive under New York law]. In the absence of such a statute, "it is for the federal courts to fashion the governing rule of law according to their own standards" [See, *Clearfield Trust Co. v. United States,* 318 U. S. 363 (1943), at page 367]. In view of the most advanced judicial thought on the subject, as discussed above, appellant submits that this Court should adopt as a standard that blood grouping tests excluding paternity should operate conclusively. This is particularly true where as in the case at bar exclusion arises from the A-B-O system of testing. The latter system was the earliest to be discovered, and is the one used in classifying blood for transfusions. [See Note, 34 Cornell L. Q. 72; Note 26 Calif. L. Rev. 456, footnote 3].

C. The District Court Should Have Granted a New Trial to Avoid a Failure of Justice.

A trial court should, in the exercise of sound discretion, vacate a judgment and order a new trial, where a new trial is necessary to prevent a failure of justice [*Commercial Credit Corp. v. Pepper,* 187 F. 2d 71, 75-76 (C. A. 5, 1951); *Virginia Ry. Co. v. Armentrout,* 166 F. 2d 400, 408 (C. C. A. 4, 1948); *Murphy v. United States District Court, Etc.,* 145 F. 2d 1018 (C. C. A. 9, 1945).] As this Court had occasion to point out in the *Murphy* case, *supra* (p. 1020):

> ". . . The granting of a new trial is discretionary with the court and subject to no fixed rule except *a consideration of what is just.* . . ." [Emphasis added.]

In the court below justice was thwarted by the refusal of the District Court to grant a new trial. Blood tests made of appellee and his alleged parents disclosed that it was not possible for appellee to be the child of his alleged father; and that consequently it was not possible for appellee to have acquired citizenship of the United States, as the District Court found.

IV.

The District Court Erroneously Prevented Appellant From Presenting or Offering Any Evidence to Show That Appellee's Blood Was Incompatible With That of His Alleged Parents.

The action of the court below in summarily denying appellant's motion for a supplemental order to require appellee to furnish a second blood sample and ordering judgment for appellee [R. 146-148] deprived appellant of an opportunity to present or offer any evidence to show that appellee's blood is incompatible with that of his alleged parents.

It was the understanding of both counsel and the District Court that *the hearing of June 1, 1956 was to constitute only a partial trial* [R. 61-63, 139, 143, 145]. The cause had originally been calendared "for setting for trial" on July 11, 1955 [R. 8]. However, on May 16, 1955, upon representation of counsel for appellee that "plaintiff's mother is contemplating a trip to Hong Kong" [R. 61], the court below set the matter for trial during the week of May 31, 1956 in order to obtain the testimony of appellee's alleged mother before her departure [R. 61-63]. The District Court did not consider the trial as having been completed on June 1, 1956. Certainly, the usual procedure for the conduct of a complete trial

as not followed, since appellant did not at any time ither open or rest his case. At the conclusion of the earing the court remarked [R. 145]:

> "The matter will stand submitted. *No, it is not submitted yet. After the receipt of the blood and the report of the doctor, we will have to have the doctor here to testify what it means. . . .*
>
> *"The matter will be continued until you receive the blood tests and receive the reports. Then I would like the matter to be set down for a hearing. . . ."* [Emphasis added.]

Since it was clearly understood that the hearing of une 1, 1956 would constitute only a partial trial, appel- ant made no effort to offer the *evidence then available* o show that appellee's blood was incompatible with that f his alleged parents. In addition to the blood tests ade of appellee's alleged parents on June 9, 1955 pur- uant to court order [R. 22, 45-47], the latter had volun- arily submitted to blood tests conducted by West Coast Medical Laboratories on September 24, 1952 [See re- orts dated September 24, 1952 relating to Quan Lun Hong and Gee Bo Yoke contained in Ex. "A"]. If he hearing of June 1, 1955 had not been only a partial rial to obtain the testimony of appellee's alleged parents, ppellant would have offered at that time evidence of the esults of the tests made on September 24, 1952.[8]

---

[8]West Coast Medical Laboratories has in its files a laboratory ecord of these tests in the handwriting of the laboratory technician ho conducted them. Albert L. Blifeld, the same laboratory tech- ician who tested the blood of appellee's alleged parents on June 9, 955, and a sample of appellee's blood on August 15, 1955 [R. 2, 45-47] made the test of appellee's alleged parents on September 4, 1952. He was on June 1, 1955, and still is available to testify.

In addition to the test made of a sample of appellee's blood on August 15, 1955 [R. 46], appellee voluntarily submitted to a blood test conducted by Dr. Eric Vio on October 21, 1952 [See reports of Dr. Vio dated October 21, 1952 contained in Ex. "A"]. If the hearing of June 1, 1955 had not been only a partial trial, appellant would have offered in evidence the reports of Dr. Vio contained in Exhibit "A," and if these reports were rejected, moved the court for a reasonable continuance in order that the deposition of Dr. Vio might have been obtained.[9] The court below had previously ruled on March 1, 1955 in the case of *Ong Hong Way v. Dulles,* Civil No. 13,379 that such reports were not admissible, and for this reason appellant had moved to have a sample of appellee's blood shipped to the United States for testing.

Exhibit "A" was offered in evidence for the restricted purpose of showing the action taken before the American Consul [R. 95]. However, it can be strongly urged that the reports of Dr. Vio contained in this exhibit are admissible for the purpose of showing the results of the blood test made of appellee. Had this test been conducted by a physician in the employ of the United States government, there would be no question of their admissibilty as a duly authenticated government record [28 U. S. Code, Section 1733; *United States v. Ware,* 110 F. 2d 739 (C. C. A. 5, 1940); *Burak v. United States,* 101 F. 2d 137 (C. C. A. 9, 1939); Wigmore on Evidence, 3rd Ed., Vol. V, §1630, *et seq.*]. While Dr. Vio was not in the employ of the United States as such, as a physician in

---

[9]It is submitted that a denial of such a motion would have been an abuse of discretion in view of the fact that the early hearing of June 1, 1955, had been chosen for the convenience of appellee's alleged mother.

Hong Kong, he was obligated to perform his duties properly, and there is a presumption that he did so. [*Pasadena Research Laboratories v. United States,* 169 F. 2d 375, 382 (C. A. 9, 1948), cert. den. 335 U. S. 853]. This obligation combined with the principle of "necessity" constitute the two essentials of the so-called "public document" exception to the rule against hearsay [See Wigmore, *supra,* §§1631-1632]. Moreover, the blood test was conducted by Dr. Vio pursuant to a request by the American Consulate General [See, letter dated October 20, 1952 contained in Ex. "A," on which one of Dr. Vio's reports was made], and in conducting it he was acting in an official capacity for the United States government. Thus, Dr. Vio, in testing appellee's blood, may be considered as a *de facto* public official, and as such his reports of the result of his test, duly authenticated, should be admissible [See Wigmore, *supra,* §1633].

However, appellant was not afforded an opportunity to present evidence of the results of the blood tests made of appellee and his alleged parents during 1952, or of those made during 1955 [R. 146-148]. Despite the fact that the District Court had stated at the conclusion of the hearing of June 1, 1955 that the matter was not submitted, and had indicated that a further hearing would take place [R. 145]; on August 16, 1955 the trial court peremptorily denied appellant's motion for a supplemental order to require appellee to furnish a blood sample, ordered judgment in favor of appellee, *and even refused to permit appellant to make an offer of proof* [R. 147-148].

Appellant believes the District Court erred in denying its motion for a supplemental order; but even if this was not erroneous, the action of the court below in ordering judgment for appellee without affording appellant an op-

portunity to present any evidence to show the incompatibility of appellee's blood with that of his alleged parents requires reversal of its judgment. The erroneous exclusion of evidence resulting in prejudice to a party constitutes reversible error [*Southern Pac. Co. v. Humphrey,* 97 F. 2d 29 (C. C. A. 9, 1938), cert. den. 305 U. S. 656; *New York Alaska Gold Dredging Co. v. Walbridge,* 76 F. 2d 655 (C. C. A. 9, 1935); *Bates v. Oregon-American Lumber Co.,* 295 Fed. 1 (C. C. A. 9, 1924)]. *A fortiori,* where a court refuses to allow completion of a trial, and thereby prevents a party from presenting or offering any evidence on a material issue, its judgment should be reversed.

V.

The District Court Erred in Denying Appellant's Motion for a Supplemental Order to Require Appellee to Furnish a Blood Sample.

In its Memorandum Opinion [R. 31-35] the court below gave as reasons for denying appellant's motion for a supplemental order to require appellee to furnish a blood sample the fact that appellee had been required to pay for the original blood sample [R. 33]; the fact that the government had failed to comply with the original order requiring appellee to furnish a blood sample, in that sample was drawn by Dr. Vio instead of Dr. L. T. Ride, as the order provided [R. 33]; and the fact that the matter had been pending in court since December, 1952 [R. 34].

The original order of the District Court [R. 16-19] did not provide for payment; consequently, the fact that appellee was required to pay, even though erroneous, was not in violation of that order. Moreover, upon learning

n July 18, 1955, that appellee had been required to de-ray the expenses in connection with his blood sample R. 23-27], appellant proceeded with dispatch to arrange or his reimbursement [R. 29-30].

Counsel for appellant has been informed that at the ime the original blood sample was drawn, Dr. Ride, amed in the court's order to draw a sample of appellee's lood, had left Hong Kong, and was not expected to re-urn for several months. It was therefore impossible to omply with the order of the District Court in this re-pect. Dr. Vio, who was substituted, although referred o by the court below as "a doctor unknown to this court," ad previously made a blood test of appellee himself [See Ex. "A"]. There would seem to be no sound basis for ttributing the hemolysis of the first sample to the neg-gence of Dr. Vio [R. 33].

Appellant can only speculate as to the reasons the case ad been pending since December, 1952. However, it vas probably due to the congestion of the court's calen-ar resulting from the large number of cases of a similar ature which were filed just prior to December 24, 1952 See *Ly Shew v. Acheson,* 110 F. Supp. 50, 54-55 (N. D. Calif., 1953), reversed on other grounds, *sub. nom. Ly Shew v. Dulles,* 219 F. 2d 413]; to the fact that the pass-ort file relating to appellee [Ex. "A"] was not received n the office of the United States Attorney for the South-rn District of California until on or about March 19, 954 [R. 43]; and to the fact that appellee still resided n Hong Kong, B. C. C. [R. 43]. Granting appellant's notion would have occasioned little delay. The original lood sample was returned to the United States within a

month after the court's order was filed[10]; and a second sample could undoubtedly have been obtained in at least the same period of time. Considering the magnitude of the right which the judgment of the District Court vested in appellee, an additional delay of one month would seem relatively unimportant.

While some courts hold that a motion under Rule 35 for a physical examination is discretionary with the trial court [*Bucher v. Krause,* 200 F. 2d 576 (C. A. 7, 1952); *Teche Lines v. Boyette,* 111 F. 2d 579 (C. C. A. 5, 1940)]; discretion relates to judicial, rather than arbitrary action [*Glove Indemnity Co. v. Stringer,* 190 F. 2d 1017, 1018 (C. A. 5, 1951)]; and action becomes arbitrary when it is exercised for an erroneous reason [*Beck v. Wings Field, Inc.,* 122 F. 2d 114, 116 (C. C. A. 3, 1941); *National Ben. Life Ins. Co. v. Shaw-Walker Co.,* 111 F. 2d 497, 507 (C. A. Dist. Col., 1940), cert. den. 311 U. S. 673]. Moreover, this Court has held that although a measure of discretion with respect to a matter is vested in the trial court; where the issues do not rest upon conflicting testimony and an appellate court has substantially the same information as was available to the trial judge, it will not "evade responsibility by resorting to the rule of discretion" [*Walton N. Moore Dry Goods Co. v. Lieurance,* 38 F. 2d 186, 193 (C. C. A. 9, 1930)].

Therefore, even though this court should hold that action upon appellant's motion for a supplemental order was discretionary; appellant submits that its denial, which possibly enabled appellee to judicially establish a fraudulent claim to citizenship was, under the circumstances, an abuse of discretion.

---

[10]The order was filed on May 17, 1955 [R. 19] and the sample was received by West Coast Medical Laboratories on June 14, 1955 [R. 21].

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the judgment of the District Court should be reversed and the cause remanded, with directions to dismiss appellee's action for lack of jurisdiction, or, in the alternative, for further proceedings.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant United States Attorney,
Chief of Civil Division,

JAMES R. DOOLEY,
Assistant United States Attorney,

Attorneys for Appellant.